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SUBJECT: UKRAINE'S DRAFT CRIMINAL PROCEDURE CODE SUBMITTED TO PRESIDENT, BUT TIME RUNNING OUT FOR PASSAGE

REFTEL: 08KYIV2456

¶1. Summary: On March 10, 2009, Ukraine's National Commission for Strengthening Democracy and the Rule of Law (NCSDRL) submitted to the President of Ukraine a revised draft of the proposed new Criminal Procedure Code (CPC). The President must now introduce the draft into Parliament, but if the CPC isn't passed in the next several months, election year dynamics could derail the process. Maintaining the CPC's key provisions during Parliamentary review will require close monitoring. Once in Parliament, the draft CPC will encounter intense controversy. The Prosecutor General's Office (PGO) has so far been the harshest critic of the code, supported by other law enforcement bodies. When enacted, this CPC will transform the Ukrainian criminal justice system, replacing outdated Soviet-era proceedings with open and genuinely adversarial trial processes. The CPC would represent a major step toward bringing Ukraine's criminal justice system into compliance with Euro-Atlantic standards, particularly the European Convention on Human Rights.
End Summary.

Chance for Major Reforms - Hopefully

¶2. At a December 10, 2008 NCSDRL meeting chaired by President Yushchenko, the revised draft CPC was approved (reftel), with orders to finalize the language by March. Yesterday, the NCSDRL completed necessary revisions and submitted the revised draft to the President. The President is now expected to approve the draft and submit it to the Parliament. Although Parliamentary passage is the sole remaining hurdle, election year dynamics may prove to be a crucial test for the integrity of the proposed legislation.

¶3. Once the draft CPC enters Parliament, it will become a subject of intense controversy. The Prosecutor General's Office (PGO) has so far been the harshest critic of the code, supported by allies among the police, other law enforcement bodies, and certain retrograde members of the judiciary and of Parliament. The PGO's criticisms are wide-ranging, but focus primarily on those changes that would alter the traditional Soviet-era role of the Procuracy, and serve to limit its power. In the wider legal community, the draft CPC enjoys considerable support. Such support is particularly evident in the Ministry of Justice and other legal institutions outside of strict law enforcement, at leading law academies, and amongst forward looking members of Parliament who are eager to continue Ukraine's path toward Euro-Atlantic integration.

¶4. To address this, Mykola Onishchuk, who is both the chair of the NCSDRL and the Minister of Justice, plans a public relations campaign aimed at generating support for the reforms embodied in the draft. At his request, the US Department of Justice OPDAT program (DOJ/OPDAT) has agreed to help support such a campaign, and to coordinate with other international donors and advocates of reform. This campaign would be impaired somewhat if promises from the

governing coalition that Onishchuk is soon to be removed as Minister of Justice, possibly as soon as March 19, are finally fulfilled. But Onishchuk is expected to remain as chair of the NCSDRL, and to continue to push for passage of the draft CPC.

¶5. Passage of the CPC is one of the NCSDRL's key objectives in reforming Ukraine's justice institutions and legislation (reftel.) The new draft CPC, which was authored by leading Ukrainian legal figures, has been vetted by the CoE and found to comport with European standards for criminal justice and human rights. CoE experts found the CPC to be "well structured and relatively efficient and respectful of human rights," and stated that it introduces a sound basis for major reforms to Ukrainian criminal procedure. Throughout this process, the NCSDRL received support from DOJ/OPDAT, which organized drafting retreats and roundtables, provided expert input, and arranged for the participation of American and European criminal procedure specialists.

Rights Denied: Why the CPC matters

¶6. Every year, the European Court of Human Rights issues a large number of decisions faulting the Ukrainian criminal justice system. These focus mostly on denial of the rights to a fair trial, to reasonable limits on pretrial detention, and to an effective defense. The CoE's Venice Commission has similarly authored a number of opinions explaining that Ukraine's criminal justice system fails to comply with both international and European standards.

¶7. The draft CPC would, for the first time, enshrine fundamental human rights and due process protections into Ukraine's criminal justice system, transforming the current Soviet-style system to an open advocacy process that comports with Western and European norms.

Criminal prosecutions currently consist of the compilation of the prosecutor's written case file, subjected at "trial" to little more than a superficial review by the judge for procedural irregularities - which leads to conviction in over 99% of cases charged by the all-powerful procuracy. Instead, the draft CPC would provide reasonable limits on pretrial detention and require that secret investigative techniques be approved by both a supervising prosecutor and a court. It would also grant criminal defense attorneys equal status with prosecutors, including a discovery system in which prosecutors furnish relevant information to defense counsel in advance of trial, as well as entitle defense counsel to learn about and challenge illegal investigative methods, empower the defense to retain its own experts and provide its own analysis of relevant evidence. The Code would also enable the courts to dispose of uncontested charges through guilty pleas and enable prosecutors to make more effective use of cooperating defendant-witnesses. Most critically, the draft CPC would introduce an adversarial trial process based upon the ECHR principle of "equality of arms" in which both the prosecution and the defense have the right to call witnesses, to cross-examine witnesses, and to introduce evidence.

¶8. For the most serious offenses, generally those carrying a maximum sentence of life imprisonment, the CPC would also provide for the first time for trial by jury. (Although jury trials are established in the existing Ukrainian constitution, there has never existed any legal mechanism to actually establish such trials, and they do not presently take place.) This new institution would empower the Ukrainian citizenry to participate in what has traditionally been the sole domain of the judiciary, and effectuate Ukraine's own constitutional principles.